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MICHAEL MARTIN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL MARTIN, et al., Defendants	CR-14-0093-JSW DEFENDANT'S SENTENCING MEMORANDUM Date: December 6, 2016 Time: 1:00 p.m.

The defendant, MICHAEL MARTIN (MARTIN), by and through his counsel of record, Dena Marie Young, hereby submits his Sentencing Memorandum.

INTRODUCTION

Following a jury trial, MARTIN was convicted of conspiracy to commit robbery and of four specific robberies in the course of that conspiracy. He concurs with the criminal history calculations as determined by the Probation Department. However, MARTIN objects to the guidelines calculation, especially to the application of the adjustment for obstruction.

MARTIN grew up in a poor but stable and loving home. He learned from a young age, the value of home and family. Unlike many defendants who find themselves before the criminal courts, MARTIN has no history of substance abuse or mental illness. He has a high school diploma, some education beyond that, and has worked in responsible jobs. In the aftermath of a work-related injury, and following the loss of his job of ten years when the plant closed, MARTIN allowed himself to become involved in a situation from which he should have walked away. Now, he finds himself, at age 42, facing the possibility of spending the rest of his life in prison. He knows that his choices have put his children's future in jeopardy and that he has placed an enormous burden on his wife to raise those children on her own.

MARTIN has admittedly made some bad decisions along the way, and understands that he must be punished. However, he is also a person who holds his family dear, and who has shown himself to be capable of hard work. Due to his age, a sentence which is too long will make it nearly impossible for MARTIN to obtain employment when he is released.

Further, other related defendants have received, or will receive sentences far lower than is contemplated here. A related defendant who pled early, but has greater criminal history and appears to have been far more involved in criminal conduct than MARTIN received a sentence of 210 months.

For these reasons, MARTIN respectfully requests that this Court sentence him to a custodial term of 180 months, a sentence below the applicable Guideline range. Such a sentence would be sufficient, but not greater than necessary, to achieve the goals of 18 U.S.C. §3553(a).

BACKGROUND

MARTIN was born in Oakland where he lived until he was 17 years old. He was the youngest of four sons, though his brothers were all substantially older than him. MARTIN's father was a retired welder who had worked at Alameda Naval Air Station. His mother worked an early shift in a school cafeteria, so she was home in the afternoons to be with her children. The family was poor, and the neighborhood where they lived reflected their economic status. MARTIN's family life was stable. His parents remained together until his father died of cancer in 1997.

Throughout his childhood, MARTIN participated in school sports. He was active in the church. While in Oakland, his father regularly drove a shuttle bus to pick up seniors or other church members who could not otherwise get to services. Through his participation in sports and in the church, MARTIN met people who served as positive role models and mentors. Despite the family's move to Sacramento when MARTIN was 17, he graduated from high school, and went on to pursue higher education. Although he was not able to complete a college education, MARTIN did obtain an accounting certificate from Heald Business College.

MARTIN has worked in a number of jobs driving delivery trucks, operating a forklift, and even accounting for Marine World. From 2000 to 2010, MARTIN worked at the NUMMI plant in Fremont in increasingly responsible positions, from assembly line to team leader. He was also a union representative.

Two things happened to derail his work life. First, MARTIN suffered a serious knee injury in a fall at work. He received Social Security Disability for this injury. Second, the NUMMI plant closed, leaving him with no job at all.

In 2012, MARTIN owned and operated a fish restaurant in Tracy called Tabby's after his deceased father. The restaurant was regularly showing a small profit at the time of MARTIN's arrest in January of 2014, but had to be closed due to his incarceration pending trial in this case.

MARTIN married his wife Myisha in 1998. They remain married today. MARTIN maintains a close relationship with Myisha's adult son who did not have a relationship with his own biological father. He is also the father of a teenage daughter (Mykayla, age 14) who is currently on medication for ADHD. MARTIN's commitment to his family is demonstrated through his tattoos. These include a memorial tribute to his father, and the names of his wife and children associated with M & M cartoon characters. While he was out-of-work, MARTIN devoted his time to caring for his children.

During his childhood in Oakland, MARTIN met Clarence Andrews. Andrews came from a single-parent home, and was frequently picked on by other kids in the neighborhood. As they grew up, Andrews was frequently in trouble. MARTIN saw him as almost like a younger brother. From an early age, MARTIN tried to protect Andrews from his troubles. As they grew up, this became a relationship where Andrews had the ability to take advantage of his relationship with MARTIN to further his own schemes. At various times, Andrews obtained false identification and credit cards in MARTIN's name. He used MARTIN's knowledge to rob the cash room at MARTIN's place of employment which resulted in MARTIN being convicted of an accessory charge. It was Andrews who was friends with J.N. and who introduced MARTIN to him.

I.

OBJECTIONS TO PRE-SENTENCE REPORT

A. Martin Objects to the Imposition of a Two-point Upward Adjustment for Obstruction of Justice under §3C1.1

MARTIN objects to the imposition of a two-level obstruction of justice enhancement based upon his trial testimony. (Paragraphs 12-13, 23, 30, 38, 46, 5, 7 and 65). He requests that this Court not impose an adjustment for obstruction of justice.

U.S.S.G. §3C1.1 provides for a two-level increase in base offense level where a defendant has willfully obstructed or impeded the administration of justice during the prosecution of the offense for which he is being sentenced. Application Note 4 lists perjury as one example of conduct that will support an obstruction of justice enhancement. U.S.S.G. §3C1.1, comment. (n.4(B)). The guideline thus applies to a case where the defendant testifying under oath has provided "false testimony at his own trial 'concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). As the Supreme Court explained in *Dunnigan*, where a defendant objects to the imposition of this enhancement on the basis of his trial testimony, the district judge "must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice" under this definition. *Id*. at 95; see also *United States v. Mattarolo*, 209 F.3d 1153, 1159 (9th Cir.1999); *United States v. Morgan*, 238 F.3d 1180, 1187 (9th Cir.2001); *United States v. Glover*, 101 F.3d 1183, 1192 (7th Cir.1996); *United States v. Nobles*, 69 F.3d 172, 191 (7th Cir.1995).

The finding of an obstruction of justice must encompass all the factual predicates for a finding of perjury. See *United States v. Rubio-Topete*, 999 F.2d 1334, 1341 (9th Cir.1993)(no enhancement for obstruction because district court found that defendant had testified falsely but did not find that falsehood was willful or material).

The Commentary for U.S.S.G §3C1.1 also provides guidance to the court on the application of the obstruction adjustment under that section:

> Limitations on Applicability of Adjustment - This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony, or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes result from confusion, mistake, or faulty memory, and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

U.S.S.G §3C1.1, comment. (n.2).

In this case, the truth or falsity of MARTIN's testimony is measured against the testimony of two cooperating witnesses - father and son - who were given ample incentive to testify according to the wishes of the Government which will ultimately determine how much of a benefit they should get. They were even housed together while in custody, giving them time and opportunity to compare stories. That this version of the story ultimately resulted in MARTIN's conviction in the judgment of the jury does not mean that it is objectively true. Nor did the jury have to believe everything J.N. and K.B. said in order to find MARTIN guilty.

Just as the cooperating witness' versions are not objectively true, neither was MARTIN's testimony objectively false. MARTIN rented the vehicles used in the robberies under his own name, using his own identification and his own credit card to make the reservations. When one of the vehicles was not returned (since, unbeknownst to MARTIN it had been impounded by law enforcement), MARTIN filed a police report on the missing vehicle and called various law enforcement agencies trying to find the vehicle. These actions are not consistent with someone who knows that the vehicles were being used for criminal purposes and who wanted to hide his involvement in those crimes. Given the history of the relationship between Clarence Andrews and MARTIN as presented to the jury, the jury could have decided MARTIN should have inferred that something illegal was going on. It does not follow, as asserted by probation, that the jury found MARTIN's testimony false. The jury could have found MARTIN guilty on an aiding and abetting theory for renting the robbery vehicles even if they did not believe MARTIN was personally present during the robberies.

To impose an enhancement for obstruction of justice where, as here, there is no objective way to measure what is true and what is materially false so as to constitute perjury creates a risk of punishing the defendant for exercising his right to jury to trial and his right to testify in his own defense. Therefore, MARTIN respectfully requests that this Court not impose an enhancement under U.S.S.G. §3C1.1.[1]

B. MARTIN Objects to the Addition of Grouping Points for the Uncharged Robberies Included in Count 1

The conspiracy charged in Count 1 includes the specific robberies charged in Counts 3 -6. MARTIN acknowledges that the guidelines provide that a conspiracy involving more than one offense should be"treated as if defendant had been convicted on a separate count of conspiracy for each offense the defendant conspired to commit." U.S.S.G. §1B1.2(d); see also U.S.S.G. § 3D1.2 Application Note 8. Application Note 4 to U.S.S.G. §1B1.2 provides that particular care must be taken in applying subsection (d) because there are cases in which the verdict does not establish which offenses were the object of the conspiracy. In such cases, (d) should "only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." U.S.S.G. §1B1.2, comment. n.4.

In this case, the February 9, 2013, and April 3, 2013, robberies were not charged individually. The jury was not asked to make any finding that they were committed by MARTIN beyond a reasonable doubt. Nor has MARTIN admitted participating in those robberies. As such, it would be inappropriate to treat them as separate offenses within the conspiracy for guideline purposes. As set forth in the pre-sentence report, these offenses add a total of one additional grouping point. MARTIN respectfully requests that this grouping point not be added.

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[1] In reviewing the pre-sentence report, it appears that Paragraphs 46 and 57 contain language which references flight under §3C1.2 instead of the intended obstruction language of §3C1.1. If the Court does ultimately impose the obstruction enhancement, MARTIN requests these paragraphs be corrected to reflect the same language as Paragraphs 23, 30, 38, and 65.

C. The Resulting Guideline Range Is Level 38 Rather Level 41

Absent the two-point adjustment for obstruction, and the additional grouping point for the uncharged robberies, the adjusted offense level would be 38, which, at Criminal History III, results in a guideline range of 292-365 months rather than 360 months to life.

II.

THIS COURT SHOULD IMPOSE A SENTENCE OF 180 MONTHS BECAUSE IT IS A REASONABLE SENTENCE CONSIDERING THE FACTORS SET OUT IN 18 U.S.C. §3553(A).

While the guidelines must be respectfully considered, they are one factor among the §3553(a) factors that are to be taken into account in arriving at an appropriate sentence. *United States v. Carty*, 520 F.3d 984, 992 (9th Cir.2008). Sentencing courts must give "meaningful consideration" to all of the statutory factors in 18 U.S.C. §3553(a). Section 3553(a) clearly states that a court must impose a sentence that is "sufficient but not greater than necessary to comply with the purposes of sentencing." This requirement is often referred to as "the parsimony provision," and the Supreme Court has referred to it as the "overarching instruction" of 18 U.S.C. §3553(a). See *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38, 47 (2007). Although the offender's conduct is part of the sentencing equation, it is not the totality of it, and the sentencing court must not focus on the offense at the expense of the individual offender. *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Ameline*, 409 F.3d 1073 (9th Cir.2005)(en banc). The sentence must be long enough to reflect the seriousness of the offense, provide for just punishment and promote respect for the law. Further, it should afford adequate deterrence to criminal conduct in general and protect the public. It must be "sufficient but not greater than necessary" to reflect societal concerns and individual considerations. *United States v. Crowe*, 563 F.3d 969, 977 n.16 (9th Cir. 2009). As stated by the Supreme Court in *Gall*, 552 U.S. at 50 n. 6:

> Section 3553(a) lists seven factors that a sentencing court must consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §3553(a)(1). The second factor requires the consideration of the general purposes of sentencing including: "the need for the sentence imposed–(A) to

> reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." §3553(a)(2). The third factor pertains to the "kinds of sentences available, §3553(a)(3); the fourth to the Sentencing Guidelines; the fifth to any relevant policy statement issued by the Sentencing Commission; the sixth to "the need to avoid unwarranted sentence disparities," §3553(a)(6); and the seventh to "the need to provide restitution to any victim," §3553(a)(7). Preceding this list is a general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in the second factor. §3553(a).

EVALUATION

The nature and circumstances of the offense were presented to the court at jury trial, and are set forth in the pre-sentence report. However, trial did not give the court a true sense of who MARTIN is as a person. Throughout much of his adult life, MARTIN has held a responsible job. He has maintained a long-term marriage and is an involved parent. He has a deep commitment to family. He has demonstrated that he is capable of being a productive member of society.

The dark side to his commitment to family and friends is his misplaced loyalty to childhood friend Clarence Andrews. Even when he knew his relationship with Andrews was detrimental to him, and that Andrews frequently took advantage of the friendship, he stuck by his old friend, even when his wife disapproved. MARTIN now realizes that he must cut all ties to this relationship. He acknowledges that he has been in denial about Andrews' influence over him for a very long time. MARTIN is deeply disappointed in himself for getting involved in this situation. He regrets not listening to his wife. He is saddened that he has put his wife in the position of having to raise their children on her own, and that his teen daughter will grow up without the guidance that only a father can provide. He is also sorry for the victims of this conspiracy.

Although not an excuse, these offenses occurred at a time in MARTIN's life where he was in a period of transition. He had been seriously injured in an accidental fall at the NUMMI plant, and was recovering from the resulting disability. Around the same time, the plant, where he had worked for ten years, closed for good. The disability would have made it difficult for

MARTIN to obtain other employment. It was also during this time that MARTIN opened a fish restaurant in Tracy, named in memory of his father. MARTIN loved to cook, and the restaurant was showing a small profit, but the pressure on him to provide for his family must have been enormous.

At age 42, MARTIN is now facing the longest sentence he has ever faced in his life. He understands that the court can choose to incarcerate him for a very long period of time, and to essentially warehouse him, potentially for the rest of his life. Such a sentence is not necessary to deter MARTIN from future criminality, nor is it necessary for protection of the public.

MARTIN recognizes that this is really his last opportunity to put his life back on track, and to once-again become a productive citizen for his sake and for the sake of his family. With a sentence of 180 months, MARTIN will be in his mid-50's when he is released. MARTIN has the job skills necessary to obtain the employment in the future. He has also demonstrated, through his restaurant business, his willingness to work hard to get where he wants to be. A sentence that is too long, at his age, will diminish both his capacity and his opportunities for future earnings. Those earnings will be necessary to pay the substantial restitution that is owing in this case. MARTIN also understands that he must avoid the negative influences in his life, including childhood friends who have led him astray.

Unwarranted disparity in sentencing is another factor that the court should consider. Clarence Andrews, who resolved the case in front of a different judge, was given a sentence of 210 months for his involvement in the same conspiracy. (CR-14-00094-YGR, Dkt. 42). Based on the Government's Sentencing Memorandum in that case (Dkt. 31), and on the testimony from this trial, it appears that Andrews was much more involved in this conspiracy than MARTIN, and that he was involved in other crimes as well. Andrews actively recruited people to participate in robberies both inside and outside of this conspiracy. Andrews had the contacts necessary to convert the stolen merchandise to cash. Andrews controlled the money. Further, at criminal history VI, Andrews' criminal record was much worse than MARTIN's. In fact, Andrews qualified as a Career Offender, where MARTIN does not.[2] A sentence of 180 months would not be out-of-line in light of their relative culpability and criminality. Those two sentences would be greater by far than any of the other involved co-conspirators.

Whatever term of imprisonment is chosen by the Court will be followed by a period of supervision. MARTIN should be given the opportunity to use that time on supervision to make the positive changes necessary to put his life back on track. After all, if he fails, further incarceration is always an available option. For MARTIN, failure is not an option. His wife and children need him. All he seeks is the opportunity to prove himself to the court.

A sentence of 180 months is sufficient to deter him from committing crimes in the future yet not so long as to deny him a meaningful opportunity to return to being a productive, law-abiding citizen in the future.

CONCLUSION

For the foregoing reasons, MARTIN respectfully requests that the court impose a sentence of 180 months. This sentence is reasonable under the circumstances and for this defendant, accounts for disparity in sentencing among the defendants in this case, and is consistent with the factors set out in 18 U.S.C. §3553(a).

Dated: November 29, 2016

Respectfully submitted,

/s/
DENA MARIE YOUNG

Attorney for Defendant
MICHAEL MARTIN

[2] Unlike MARTIN, Andrews did confess his involvement, pled guilty early in the proceedings, and was afforded the benefit of that decision.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing SENTENCING MEMORANDUM was served this date to the following parties and attorneys for parties by e-filing a copy to:

Brigid Martin
Assistant U.S. Attorney
United States Attorney's Office
Northern District of California
1301 Clay Street, Suite 340S
Oakland, California 94612

I caused the following additional parties to be personally served by e-mailing a copy to:

Jessica A. Goldsberry
United States Probation Officer Specialist
United States Probation Department
1301 Clay Street
San Francisco, CA 94102

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of November, 2016, in Santa Rosa, California.

/s/
DENA MARIE YOUNG